

In the Matter of Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area)))))))	WC Docket No. 05-281
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Covad Communications Group, Inc., NuVox Communications, Inc., and XO Communications, Inc., through their undersigned attorneys, submit these reply comments in the above referenced docket. On January 9, 2006, initial comments were filed in this proceeding responding to the Amended Petition (“Petition”) filed by ACS of Anchorage, Inc. (“ACS”) on October 6, 2005, with the Federal Communications Commission (the “Commission”) seeking forbearance from, among other things, its unbundling obligations under Section 251(c)(3) of the Communications Act of 1934,¹ as amended (the “Act”), throughout the Anchorage study area. For the reasons set forth herein, ACS’s Petition should be denied.

The commenters in this proceeding who support the Petition have made several arguments as to why the Commission should grant forbearance in the Anchorage study area. However, like the Petition itself, such arguments fail to apply required and time-tested market principles to examine the true state of competition in the Anchorage study area. Instead, they rely on vague, insufficient, and unsupportable comments to justify the untenable position that the

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Commission should eliminate the very unbundling obligations responsible for the only competition that exists in the area.

Although the comments in support of ACS's forbearance request make several different arguments attempting to justify the Petition, the major arguments can essentially be divided into the following points:

- (1) ACS's claimed loss of approximately 50% of its retail market share in Anchorage demonstrates that sufficient competition exists in the Anchorage study area to justify a forbearance determination;²
- (2) GCI has deployed its cable plant facilities nearly ubiquitously throughout the Anchorage study area or otherwise has mirrored the ACS network;³
- (3) Despite the near ubiquitous deployment of facilities in Anchorage, GCI has elected to purchase unbundled network elements ("UNEs") rather than serve customers over its own network due to the economic benefit of using UNEs and despite GCI's representations to the contrary;⁴
- (4) Forbearance from the requirement to offer UNEs will stimulate GCI's deployment of its own facilities;⁵ and
- (5) It is not in the public interest for there to exist asymmetric regulation between incumbents and competitive local exchange carriers ("CLECs") in the Anchorage study area.⁶

² *Ketchikan Public Utilities Comments* at 2, 4; *Alaska Telephone Association Comments* at 2; *Matanuska Telephone Association Comments* at 2-4.

³ *Ketchikan Public Utilities Comments* at 3, 4; *Alaska Telephone Association Comments* at 2; *Matanuska Telephone Association Comments* at 4.

⁴ *USTA Comments* at 4; *Ketchikan Public Utilities Comments* at 5-7; *Alaska Telephone Association Comments* at 2; *Matanuska Telephone Association Comments* at 6, 9.

As demonstrated below, however, these arguments are based on inaccurate factual information, lack reasoned and thorough analysis, and fail to appropriately apply applicable law. In this regard, grant of forbearance as requested by ACS will lead to an arbitrary and anti-competitive result which will ultimately harm consumers in Anchorage.

II. None of the Arguments in Favor of Forbearance are Justified Based on the Current Factual Record or Applicable Legal Precedent.

A. Proponents of Forbearance Fail to Appropriately Analyze Competition in the Relevant Product and Geographic Markets.

Proponents of forbearance argue that, because ACS has lost approximately 50% retail market share in Anchorage, the Anchorage market is sufficiently competitive to justify forbearance of the unbundling rules under Section 251(c)(3). Despite such claims, however, not a single commenter supporting forbearance has even attempted to identify the appropriate product and geographic markets, let alone perform a competitive analysis of the same with appropriate factual support, as required by Section 10 and more generally by Commission precedent in connection with prior forbearance and other competitive analyses.⁷

⁵ *USTA Comments* at 4-5; *Ketchikan Public Utilities Comments* at 8; *Alaska Telephone Association Comments* at 2-3; *Matanuska Telephone Association Comments* at 10.

⁶ *USTA Comments* at 5, 6; *Ketchikan Public Utilities Comments* at 8-9; *Alaska Telephone Association Comments* at 3; *Matanuska Telephone Association Comments* at 10-11.

⁷ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 14853 at ¶ 22 (2005) (“*Qwest Omaha Order*”). See Also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, at ¶ 123 (2003) (“*Triennial Review Order*” or “*TRO*”), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), vacated and remanded in part, affirmed in part, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”), cert. denied, 125 S.Ct. 313, 316, 345 (2004); and *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 at ¶ 43 (2005) (“*Triennial Review Remand Order*” or “*TRRO*”).

The carriers filing these comments, and several other parties opposing forbearance, set forth extensive arguments regarding the appropriate product and geographic market analysis that should be conducted as part of the initial comments filed in this proceeding.⁸ In order to make an informed and reasoned determination regarding forbearance, such market distinctions cannot be overlooked. Indeed, the Commission itself has previously applied such a market-based analysis, identifying distinct geographic and product markets in the *Qwest Omaha Order* in undertaking its latest forbearance analysis, and in the *Triennial Review Remand Order* in undertaking its UNE impairment analysis.⁹ A similar analysis, tailored to the instant facts, is required here for the Commission to be able to make any supportable forbearance determination.

GCI, as the primary intermodal competitor in Anchorage, is uniquely positioned to identify the appropriate geographic and product markets within Anchorage. In this regard, GCI has identified three distinct product markets in Anchorage, within each of which a separate forbearance analysis must be performed. These markets include: (1) residential; (2) small business; and (3) medium and large enterprise.¹⁰ In its initial comments, GCI notes that ACS has “overwhelming control of the markets for last-mile facilities” across all three product markets.¹¹ Specifically, in the residential market, the market arguably enjoying the most competition in Anchorage, GCI continues to significantly rely on ACS UNEs in several parts of Anchorage due, at least in part, to the following: (1) despite contrary ACS representations, GCI plant is not present throughout the Anchorage study area, and thus GCI is not able to serve all residential customers; (2) even where cable plant exists, not all of GCI’s network and nodes are technically

⁸ See, e.g., *GCI Comments* at 11-19; *Time Warner Telecom, Conversent, and CBeyond Comments* at 11-13; *Talk America Comments* at 1; *Comptel Comments* at 5-12.

⁹ See *Qwest Omaha Order* at ¶ 22, and *TRRO* at ¶ 43.

¹⁰ *GCI Comments* at 12.

¹¹ *Id.*

able to provide voice-grade services; and (3) GCI's cable network is simply not ubiquitous, even within its own franchise area.¹² GCI also notes that it does not have access to most multiple dwelling units ("MDUs") in Anchorage, further limiting its ability to serve residential customers with its own facilities.¹³ Based on these geographic and technical limitations, GCI has claimed that neither wire centers nor the entire Anchorage study area is the appropriate geographic market for residential service in Anchorage.¹⁴ Rather, because even within wire centers in Anchorage, there is no consistent and ubiquitous facilities-based service alternatives to that of ACS, a true competitive analysis must consider each customer location, rather than some broader arbitrary geographic area.¹⁵

As also suggested by GCI, the appropriate geographic market for small businesses similarly should not be considered the entire Anchorage study area, due to the inconsistencies in the availability of competitive alternatives for loops throughout the study area and at the wire center level, and the differences that exist between the study area boundaries and GCI's cable franchise boundaries. Indeed, the designation of the customer location as the appropriate geographic market for small businesses is even more vital than for the residential market,

¹² *Id.* at 14-15.

¹³ *Id.* at 27.

¹⁴ *Id.* at 13-16. GCI appropriately notes in its comments that "[t]he appropriate geographic markets are defined according to where GCI has plant that can be used to serve customers. . . ." *Id.* at n.42.

¹⁵ GCI's claim is sound based on the demand substitution methodology employed by the Department of Justice and Federal Trade Commission in the Horizontal Merger Guidelines. See *Horizontal Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission*, issued Apr. 2, 1992, revised Apr. 8, 1997 at 5 ("Merger Guidelines"). In the *Qwest Omaha Order*, the Commission identified the ILEC wire center, rather than the customer location, as the relevant geographic market. See *Qwest Omaha Order* at ¶ 62. While such market is larger than optimum from the standpoint of the *Merger Guidelines*, if the Commission elects to employ it for its forbearance analysis in the instant proceeding, it must have sufficient market data for each individual wire center. Thus far, the proponents of the Petition have not produced such evidence.

because there is even less cable plant deployed to businesses within Anchorage.¹⁶ These customers clearly lack access to alternatives to the ACS network.

Finally, unlike the residential and small business markets, the medium and large enterprise market generally requires more sophisticated services than traditional voice-grade DS-0s, such as DS-1 services, fractional DS-1s, and other high capacity services, which GCI is not necessarily able to serve with its current cable plant either due to a lack of physical proximity or technical inability.¹⁷ Moreover, while GCI has deployed some amount of fiber within Anchorage that can support high-capacity services, it obviously can only serve businesses within proximity to such fiber. To justify the additional fiber build-out needed to serve all enterprise customers, a certain minimum stated demand for capacity by enterprise customers would be necessary due to the significant additional investment and related expense involved.

Clearly, based on the record data, there exists a rather sophisticated geographic market scenario and at least three independent product markets, within which there are significantly different market shares, and which have essentially been ignored by ACS and its supporting commenters. Indeed, it is undisputed that both GCI and ACS treat each such market differently, and do not in practice, as alluded to by ACS and its supporting commenters, either treat the entire Anchorage MSA as a single geographic market or group all classes of customers into a single product market.¹⁸ With such disparities in the geographic availability of facilities-based alternatives to those of ACS, and the significant differences within each geographic and

¹⁶ *Id.* at 16-17.

¹⁷ *Id.* at 17-19.

¹⁸ *GCI Comments* at n.31 and 13. *See also* the ACS Website, which differentiates between residential (or personal) services and business services, located at <http://www.acsalaska.com>.

product market, it is simply inappropriate to attempt to treat all markets and all services similarly for purposes of this important forbearance analysis.

This conclusion is further bolstered when considering the wholesale market for UNEs, another market essentially ignored by ACS and its supporting commenters despite its significance to a competitive analysis under Section 10. Indeed, there is no discussion in the record regarding the existence of a robust wholesale market, which is critical to the furtherance of independent facilities-based competition in Anchorage. Currently, there is no carrier other than GCI that has either deployed its own facilities within Anchorage or is purchasing UNEs. If forbearance is granted, and recognizing the lack of ubiquity of GCI's cable plant, the only statutorily-required wholesale service delivery method that will remain available to competitors is total service resale.¹⁹ Resale, however, cannot constrain the pricing behavior of ACS if forbearance is granted, and thus truly promote the type of facilities-based competition within Anchorage as intended by the Act.

First, the wholesale discount cannot sustain ubiquitous long term competitive entry through resale. The availability of resale will thus do little to provide competitive alternatives to, or competitive pressure on, the duopoly that will arise in Anchorage if the ACS Petition is granted.²⁰ Second, the existence of resale carriers does not in any way constrain the

¹⁹ As noted by several commenters, because ACS is not a Bell Operating Company, it is not subject to the requirement to unbundle loops pursuant to Section 271, which requirement, along with the availability of resale, was a critical factor in the Commission's grant of forbearance in the *Qwest Omaha Order*. See *Qwest Omaha Order* at ¶¶ 62 and 67. See also *GCI Comments* at 46; *CompTel Comments* at 12-14; *Talk America Comments* at 1; *Integra Telecom Comments* at 3.

²⁰ As discussed at length by Talk America in its initial comments, if forbearance is granted, the most likely result will be a duopoly between the incumbent telephony provider, ACS and the incumbent cable operator, GCI, at least in those areas where their facilities overlap. *Talk America Comments* at 1-2. Where ACS remains the only facilities-based provider, a virtual monopoly will once again exist. *Id.* As further noted in the Talk America comments, former Chairman Michael K. Powell stated that, "... our policy is

prices ACS can charge for its services, because the wholesale discount is based on ACS's *retail* rate, rather than its costs of providing service. Therefore, an increase in the ACS retail rate simply serves to raise each reseller's wholesale rate, ultimately resulting in *increased* prices to consumers, which is clearly not in the public interest and not the result contemplated by Congress in formulating Section 10 of the Act.

Alternatively, cost-based UNEs are independent from ACS retail rates, and allow competitors to price their retail services *independent* of the incumbent, thus acting as a true market price constraint to the benefit of the market and consumers. Indeed, GCI has reported that, in areas where ACS is not constrained by dominant carrier regulation, it has raised its retail prices, resulting in increased costs to resellers and, ultimately, to consumers.²¹ GCI's ability to keep its prices low, despite price increases by ACS, is a direct result of the availability of UNEs, thus providing a true competitive alternative to consumers. As GCI has indicated, due to the significant geographic and technical limitations in its ability to offer service over its own facilities in competition with ACS, it must continue to rely on UNEs in many areas throughout Anchorage. Such UNE availability remains critical to ensuring a competitive market, especially where government regulation is not present to constrain the incumbent's pricing behavior as is the case in Anchorage.²²

Accordingly, ACS and other proponents of forbearance have clearly failed to make their case regarding the level of competition in Anchorage as they have failed to fully and

not one of preferred regulated monopoly or duopoly..." *Id.* at 2, citing the Remarks of Michael K. Powell, FCC Chairman, CompTel Annual Convention and Trade Exposition, Miami, Florida, March 4, 2002. It is thus incumbent upon ACS to provide credible factual and economic evidence that no such situation will result if forbearance is granted. This, however, it has not done.

²¹ *GCI Comments* at 8-10.

adequately analyze all relevant product and geographic markets, relying instead on inaccurate data regarding GCI and its network deployment and overbroad and unsupportable assertions. The only definitive factual information in the record has been presented by GCI, which clearly demonstrates that forbearance based upon some ad-hoc, consolidated market share, and inaccurate information is inappropriate in the Anchorage study area.

B. GCI Has Demonstrated its Inability to Immediately Deploy Facilities on a Ubiquitous Basis and Forbearance Will Not Promote Deployment or Advance Competition.

Despite ACS's and its supporters' arguments to the contrary, GCI has clearly indicated that its network is not ubiquitous in Anchorage and that, even where it has deployed facilities, it is not able to serve all customers in all geographic and product markets.²³ As a result, GCI remains largely reliant on the availability of ACS UNEs in order to offer services to its customers and maintain the current level of competition in the Anchorage market. As GCI is in the best position to provide accurate details regarding its network, its filings should be given significant weight over the allegations of certain commenters regarding the scope of GCI's network or its motivations to use or not use UNEs in providing services. ACS and its supporters have cited various press releases and statements made by GCI representatives regarding its

²² GCI Comments at 10-11.

²³ In the *Qwest Omaha Order* the Commission based its forbearance decision, in part, on whether an intermodal competitor is willing and able to offer facilities-based services to a substantial number of customers, as a substitute to that of the incumbent, within a commercially reasonable period of time. See *Qwest Omaha Order* at n. 156. While GCI has deployed certain facilities within Anchorage, as explained by GCI, there remain significant gaps in its coverage. In addition, GCI has made no definitive commitments as to whether it will offer additional facilities-based services to a substantial number of customers in any particular geographic or product market within a "commercially reasonable" period of time, and in fact has provided a thorough analysis regarding the challenges it would face in doing so. As such, it would be inappropriate for the Commission to rely on mere speculation of future deployment as put forth by Petitioner and its supporters, to justify a forbearance decision.

network and future facilities deployment plans in contexts other than this proceeding.²⁴ Such statements, however, must be considered in the appropriate context in which they were made. Indeed, GCI has made no statements in this proceeding that it has ubiquitously deployed its facilities or that it need not rely on ACS UNEs.

To the contrary, GCI has offered compelling definitive evidence of its ongoing need for ACS UNEs to continue to provide the competitive services it offers today. Such evidence must thus be afforded significant weight in the Commission's forbearance analysis. GCI also has provided details regarding its network build-out efforts and the significant technical and other limitations it faces in serving each product and geographic market within Anchorage.²⁵ Despite these limitations, however, GCI has indicated an ongoing commitment to deploy facilities in Anchorage to, among other things, eliminate the need for GCI to make ongoing payments to ACS and to gain full end-to-end control of each customer circuit, which will enable GCI to wholly provision and maintain service for its customers, thus providing an increased level of service quality and customer support.²⁶

Any argument that the elimination of GCI's reliance on the legacy processes of the incumbent is not sufficient incentive for GCI to deploy facilities as quickly as is financially reasonable is simply disingenuous. By relying on UNEs and migrating services to its own deployed facilities as soon as is economically reasonable, GCI is undertaking the exact process contemplated by Congress in implementing the Act. As this Commission appropriately recognized in the *Qwest Omaha Order*, it would be inappropriate to eliminate Section 251(c)(3) unbundling obligations in a market where there remains significant reliance on UNEs, as is the

²⁴ *ACS Petition* at 2, 3, 9, 14, 15, 35. *See also GCI Comments* at 35, n.145.

²⁵ *GCI Comments* at 20-32.

²⁶ *Id.* at 20.

case in Anchorage.²⁷ Indeed, the decision in the *Qwest Omaha Order* was, to a large degree, predicated on the fact that Qwest's major competitors did not significantly rely on UNE loops.

In this case, while GCI is moving as quickly as reasonably possible to deploy its own facilities, GCI remains heavily reliant on UNE loops. Yet, despite GCI's significant efforts to deploy its facilities where feasible throughout Anchorage, ACS and its supporters' argue that forbearance is necessary to further speed GCI's deployment efforts. These commenters, however, provide no valid explanation or factual justification supporting such claims. To the contrary, a grant of forbearance will not incent GCI to deploy facilities more quickly, and may actually slow its current deployment efforts. As GCI has stated in this proceeding, it is simply unable to speed up its facilities deployment beyond its current efforts because of the significant operational, technical and economic challenges it would face.²⁸ As a practical matter, the operational planning and technical limitations in and of themselves would preclude an increased deployment schedule, and potentially jeopardize service quality.²⁹ In addition, attempting to force GCI to expedite its roll-out beyond its already aggressive schedule would serve to significantly increase its costs, putting other critical programs and deployments in jeopardy, and possibly resulting in increased rates to consumers. Congress had it right when it implemented a framework that permitted market entry through use of UNEs, facilitating carriers' ability to economically migrate from UNEs to their own facilities where technically feasible. GCI's efforts are the epitome of that framework, consistent with the letter and intentions of the Act. Indeed, GCI's reliance on and use of UNE loops has been the most significant source of the very competition that ACS and its supporters cite to justify forbearance. To eviscerate the very

²⁷ *Qwest Omaha Order* at n. 185

²⁸ *GCI Comments* at 33.

²⁹ *Id.* at 33-35.

purpose of Section 251(c)(3) through a grant of forbearance in this case would serve only to unravel the significant competitive strides being made in Anchorage. This is particularly true in light of the fact that there is no other carrier in the Anchorage study area that either has deployed its own facilities or is utilizing ACS loops to provision service, the only two methods of ultimately constraining the incumbents' retail rates.

C. Regulatory Parity is Not Justified Where the Incumbent Retains Market Power.

In the *Qwest Omaha Order*, the Commission highlighted the fact that Cox's significant facilities-based presence would discipline the incumbent to ensure its "network is used to optimal capacity."³⁰ Unfortunately, the same competitive conditions do not yet exist in Anchorage. As explained above, what strides in competition have been made in Anchorage have substantially been made due to the availability of UNE loops.³¹ Notwithstanding GCI's current level of facilities deployment, ACS retains significant market power over last-mile facilities to all classes of customers. As such, if ACS's Section 251(c)(3) unbundling obligations are eliminated, there will literally be no constraining authority over ACS's decision to open its network to competitors or on what price it would charge for such access. Indeed, ACS's only motivation will be to maximize revenue and increase market share by either failing to open its network at all, or doing so at prices that make it unfeasible for competitors like GCI to compete. Without market-based constraints, competition, and ultimately consumers, will pay the price. Until there truly is equal competitive footing in each relevant product and geographic market, regulatory parity is simply inappropriate.

³⁰ *Qwest Omaha Order*. at ¶ 81.

³¹ GCI has represented that it currently serves approximately 70% of its customers using ACS UNE loops. *See GCI Comments* at 3.

III. CONCLUSION

For the reasons set forth herein and in the initial comments of Covad Communications Group, Inc., NuVox Communications, Inc., and XO Communications, Inc., the Commission should reject the Petition of ACS, and should not forbear from applying Section 251(c)(3) of the Act, and the related pricing standards for UNEs set forth in Section 252(d)(1), within the Anchorage study area.



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